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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

WILLIAM ANTHONY BROOKS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

I. Where the sentence of death was originally imposed by a jury whose discretion was not properly channeled and directed, did the failure of the Supreme Court of Georgia to remand the case for a new sentencing hearing violate petitioner's rights under the Eighth and Fourteenth Amendments?

II. Where the imposition of the death penalty rests upon the combination of multiple aggravating circumstances, one of which was found by the jury without proper guidance, is petitioner entitled to a new sentencing hearing under the Eighth and Fourteenth Amendments?

III. Whether the Supreme Court of Georgia's failure to provide for briefs or argument upon remand from this Court violated petitioner's Sixth, Eighth and Fourteenth Amendment rights?

IV. Whether the Supreme Court of Georgia construed or applied Ga. Code Ann. §27-2534.1(b)(7) in an unconstitutionally vague or overbroad fashion in petitioner's case?

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WILLIAM ANTHONY BROOKS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

Petitioner William Anthony Brooks prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered September 8, 1980.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Georgia on remand from this Court, which is not yet officially reported, is appended at 1a to this petition. The opinion of the Supreme Court of Georgia on petitioner's initial appeal, which is reported at 244 Ga. 574, 261 S.E.2d 379 (1979), is appended hereto at 4a.

JURISDICTION

The judgment of the Supreme Court of Georgia on remand was entered on September 8, 1980. No motion for rehearing was

filed. On October 29, 1980, Mr. Justice Powell issued an order granting petitioner to and including December 8, 1980, to file this petition. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense;

the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> . . . nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

This case also involves Ga. Code Ann. §27-2534.1(b), which provides in part:

> In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may supported by the evidence:
>
> * * *
>
> (2) The offense of murder . . . was committed while the offender was engaged in the commission of another capital felony . . . .
>
> * * *
>
> (7) The offense of murder . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

STATEMENT OF THE CASE

Petitioner seeks a writ of certiorari from this Court to the Supreme Court of Georgia to review a decision of that court reinstating the death sentence. The original judgment of the Georgia Supreme Court upholding the death sentence was vacated by this Court and this case was remanded "for further consideration in light of Godfrey v. Georgia, 466 U.S. ____." Brooks v. Georgia, ____ U.S. ____, 64 L.Ed.2d 821 (1980). On remand, without the benefit of briefs or arguments, the Supreme Court of Georgia reinstated the death sentence on September 8, 1980.

Petitioner is a 25 year old black male convicted by a jury on November 18, 1977, of the murder, kidnapping, rape and armed robbery of a 23-year old white woman in Muscogee County, Georgia.[1/] On the same day the jury recommended the death penalty for the crime of murder and the trial court so sentenced the petitioner.

The offense occurred on the morning of July 15, 1977, when the victim was abducted from her home and taken to a wooded area approximately one mile away where her body was found the following day. The petitioner was arrested in Atlanta on August 11, 1977, and returned to Columbus for trial.

The case received extensive pretrial publicity and a hearing on petitioner's motion for a change of venue

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1/ Although 25 to 50 percent of the population of the county in which petitioner was tried were of the same race as petitioner, no members of his race were on the jury. Report of the Trial Judge to the Supreme Court of Georgia at 6, §E.

was heard prior to trial on September 30, 1977.[2] Although agreeing that "this is one that should not be tried in Muscogee County,"[3] the trial court denied the motion.[4]

Trial began on November 15 and was televised locally. The state presented evidence that the victim was approached at her home and taken to the wooded area in her own car, which was later found near the site where the body was found. Tr. 483-85, 494, 499-512, 514-15.[5]

Dr. Joe Webber testified that he performed an autopsy and found the death was caused by internal bleeding due to a laceration of the lung resulting from a single bullet would to the neck. Tr. 591-92. He also testified that his examination found evidence of trauma to the vaginal area consistent with forced sexual intercourse. Tr. 596-97. There was no other evidence of physical abuse to the decedent beyond those injuries. Spermatozoa was identified in the fluid recovered from the vaginal canal. Tr. 596.

The petitioner was identified by the decedent's mother as the person seen leaving the home with her daughter. Tr. 487. He was also linked to the offense by fingerprint evidence, Tr. 673, statements he made to the police and others, and

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2/ At the hearing, 26 newspaper articles regarding the case were introduced into evidence. At least 15 appeared on the front page of the local papers and seven appeared on the front page of the second section. The coverage included pictures of the petitioner and the district attorney and quotations from petitioner's statements to police. Transcript of Sept. 30, 1977, at 8, 15.

3/ Transcript of Sept. 30, 1977, at 34.

4/ Id.

5/ All references to "Tr." are to the transcript of trial on November 15-18, 1977.

the testimony of Morris Comer that he was approached by petitioner near the location where the car was found and asked for a ride. Tr. 548-54.[6/] Comer said he provided the person with a ride.[7/]

Two other persons testified that they had conversations with the petitioner in which he admitted some involvement in the offense when reading or hearing about it. Tr. at 638-640, 656. However, one of those witnesses stated on cross examination that the police had told him what to say and that his direct testimony was not true. Tr. 644-46.

Two statements made by petitioner to police were introduced. In the second statement, petitioner admitted his involvement in the offense. He stated that after the victim was forced to submit to sexual intercourse and had dressed, she began to scream and that he pulled the hammer back on the pistol and pointed it at her "so she would know that I was serious." He told the police that the pistol "went off and hit her," and that he fled the scene. Tr. 759.

The jury returned verdicts of guilty as to all four offenses on November 18, 1977. Tr. 836. Following the verdict, a sentencing hearing was conducted. The state produced only one witness, a probation officer who testified

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6/ Two other persons who were approached by a black male and similarly asked for rides could not identify petitioner as the individual who approached them. Tr. 539, 546.

7/ Comer was tentatively identified as the person seen driving away in the victim's car with her by both the decedent's mother and her boyfriend at a lineup prior to trial. Tr. 490, 512. However, the mother identified petitioner at trial as the person in the car with her daughter, Tr. 487, and the boyfriend did not make an identification at trial. Tr. 505.

that the petitioner's reputation was bad. Tr. 838-840. The defense produced petitioner's mother and two sisters who testified about his premature birth and the abuse that he received as a child from his stepfather. Tr. 841-58.

The jury was instructed orally and in writing that it could impose the death penalty if it found any one of three statutory aggravating circumstances set out in Ga. Code Ann. 27-2534.1 (1978). Under subsection (b)(2) of that statute, the jury was instructed that it could impose death if it determined that the offense of murder was committed while petitioner was engaged in the commission of either or both of two other capital felonies, rape and armed robbery. Tr. at 885-886. App. at 14a-15a. With regard to subsection (b)(7), the jury was instructed that it could impose death if "[t]he offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved an aggravated battery to the victim." Tr. at 886, App. at 15a. [Emphasis added.] There was no mention of the other two components of (b)(7): depravity of mind or torture.[8/] Nor was there any definition of any of the terms of (b)(7) in the trial court's instructions to the jury.

The prosecutor in his closing argument, other than referring to the crime as "horrible,"[9/] made no suggestion of the applicability of (b)(7) to the facts of petitioner's

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8/ Ga. Code Ann. §27-2534.1(b)(7) defines the aggravating circumstance as follows: "The offense of murder . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

9/ After arguing that "you wouldn't do that . . . to a stray animal that you wanted to get rid of" the prosecutor asked: "If you sat down and tried to think up a horrible crime, could you think of anything more horrible than what you've heard here this week, what this defendant committed on this young lady? Could you think of anythink more horrible?" Tr. 863.

case. Instead, he suggested some reasons for imposing the death penalty contained in neither the statute nor the trial court's instructions: his belief that the petitioner would kill again, the possibility that he would kill prison guards if sentenced to life imprisonment, the possibility that he would kill a fellow prisoner, the possibility that he would escape and commit the same crime against someone else's girl friend or daughter, and the savings to the jurors as taxpayers of the cost of housing, feeding and clothing the petitioner if he were sentenced to death instead of life imprisonment. Tr. 868-69.10/

The jury was provided with a verdict form permitting it to base a recommendation of death upon a single aggravating circumstance, a combination of aggravating circumstances or multiple aggravating circumstances independent of one another. App. at 16a. After deliberating less than an hour, the jury returned a recommendation of death and stated in writing its finding of the following statutory aggravating circumstances: "armed robbery, and rape, and the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind to the victim." Tr. at 890; App. at 17a [Emphasis added]. There was no finding of aggravated battery or torture by the jury.

In its initial review of the case the Georgia Supreme Court affirmed and upheld the "depravity of mind" part of

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10/ The prosecutor's only mention of the statutory aggravating circumstances came at the end of the argument when he told the jury that it could impose death if it found that the murder was committed while petitioner was engaged in kidnapping or armed robbery. Tr. 872. (With regard to the (b)(2) circumstances, the trial court instructed as to commission of the murder during rape or armed robbery, but not kidnapping.) The prosecutor never referred to the instruction based upon (b)(7) or asserted that the dececent was tortured prior to death.

the sentence without elaboration other than citing Johnson v. State, 242 Ga. 649, 250 S.E.2d 394 (1978)[11/] Brooks v. State, 244 Ga. 574, 261 S.E.2d 379, 387 (1979). The court expressed its view that the case involved "an absolutely unprovoked murder." Id.

Following this Court's remand on May 27, 1980, the Supreme Court of Georgia upheld the finding of "depravity of mind" on the theory that "'the fact that the victim was tortured will . . . support a finding of depravity of mind. . . .'" Brooks v. State, opinion on remand at 2, App. at 2a, citing Hance v. State, ____Ga.____, 268 S.E.2d 339, 346 (1980). The Georgia Supreme Court found:

> [T]he victim died, not instantaneously, but a full two hours after being shot in the neck and abandoned by the appellant, death resulting from a slow but steady loss of blood.
>
> Also, it is beyond question that the appellant seriously and sexually abused [the victim]. See Hance v. State, supra, (physical abuse includes sexual abuse for purposes of proving torture under Code Ann. §27-2534.1(b)(7)).
>
> Finally, following his rape of [the victim], the appellant taunted his victim with her lost virginity and made her the target of his gun, said acts combining to cause her to scream uncontrollably. See Hance v. State, supra (physical abuse includes psychological abuse resulting in mental anguish to the victim in anticipation of physical harm.)

Opinion on remand at 2, App. at 2a. The court also based its reimposition of the death penalty upon the jury findings pursuant to subsection (b)(2):

11/ In Johnson, the court upheld a death sentence based upon §(b)(7) where the victim was murdered "in a methodical, execution-style fashion" after being raped. 250 S.E.2d at 400.

> "Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death based thereon." Gates v. State, 244 Ga. 587, 598 (261 S.E.2d 349) (1979).

Opinion on remand at 1, App. at 1a.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The questions raised by this brief were not expressly raised in petitioner's trial or his brief on direct appeal to the Supreme Court of Georgia. Nevertheless, they were sufficiently raised and considered in the Supreme Court of Georgia to sustain this Court's jurisdiction. Under Ga. Code Ann. §27-2537(c)(2), the Supreme Court of Georgia is expressly required to ascertain whether "the evidence supports the jury's . . . finding of a statutory aggravating circumstance."

In its original opinion, the Georgia Supreme Court upheld the finding of depravity of mind upon the basis of its decision upholding such a finding in another rape murder case, Johnson v. State, supra. Brooks v. State, supra, 261 S.E.2d at 387. In its opinion upon remand, the court held:

> [T]his court reaffirms the appellant's sentence of death on the ground that, unlike the jury's finding of Code Ann. §27-2534.1(b)(7) in Godfrey v. State, the jury's finding of said statutory aggravating circumstances in the present case was supported by legally sufficient evidence.

Opinion on remand at 2, App. at 2a. The Georgia Supreme Court did not provide for briefs or arguments prior to its decision on remand.

REASONS FOR GRANTING THE WRIT

Upon receiving this case upon remand from this Court "for further consideration in light of Godfrey v. Georgia, 446 U.S. ___,"[12] the Supreme Court of Georgia, without the benefit of briefs, arguments or other procedures, issued a two-page opinion reimposing the death penalty. App. at 1a.

The Georgia Supreme Court's reimposition of the death penalty originally imposed by a basically uninstructed jury in a standardless and uncontrolled exercise of discretion raises important constitutional issues which this Court should consider. Each of those issues will be set out in this section of this petition.

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER PETITIONER IS ENTITLED TO A NEW SENTENCING HEARING AT WHICH CONSIDERATION OF THE SENTENCE OF DEATH IS PROPERLY GUIDED BY CLEAR AND OBJECTIVE STANDARDS.

The jury at the sentencing hearing below was instructed that it could impose the death penalty pursuant to Ga. Code Ann. §27-2534.1(b)(7) if it found that "[t]he offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved an aggravated battery to the victim."[13] In returning its sentence of death, the jury expressed in writing its finding of "depravity of mind to the victim." It had not been instructed that it could make such a finding.[14]

12/ Brooks v. Georgia, ____U.S.____, 64 L.Ed.2d 821 (1980).

13/ The jury was also instructed with regard to aggravating circumstances pursuant to Ga. Code Ann. §27-2534.1(b)(2). The instructions, jury findings and Georgia Supreme Court review are described herein at 6-9. The jury instructions appear in the appendix to this petition at 13a - 15a, the jury verdict is at 17a, and the decision of the Georgia Supreme Court on remand appears at 1a.

14/ The jury finding was apparently based upon the verdict form submitted to it with the court's instructions. The form contained the words "depravity of mind to the victim." The form is appended at 16a.

The Georgia Supreme Court upheld the finding of the jury on remand from this Court on the basis of its conclusion that the victim was tortured, an assertion which was not made at the sentencing hearing or found by the jury.

Thus, the process of imposing the death sentence upon petitioner fell woefully short of the constitutional commands that in considering death, the sentencer's discretion must be channeled by "clear and objective standards"[15/] that provide "specific and detailed guidance"[16/] and that make "rationally reviewable the process for imposing a sentence of death."[17/] Godfrey v. Georgia, 446 U.S. ____, ____, 100 S.Ct. 1759, 1764-65, 64 L.Ed.2d 398, 406 (1980)(Plurality opinion).

The jury in petitioner's case below was provided with no definition of "aggravated battery" or of any other terms of (b)(7) in the trial court's instructions. Thus, as in Godfrey, the trial judge's sentencing instructions "gave the jury no guidance concerning the meaning of any of §(b)(7)'s terms. In fact, the jury's interpretation of §(b)(7) can only be the subject of sheer speculation." Godfrey v. Georgia, supra, 100 S.Ct. at 1765 (Plurality opinion).

Therefore, because petitioner's sentencing hearing before the Georgia trial court was constitutionally defective, it must be determined whether he is entitled under the Constitution

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15/ Gregg v. Georgia, 428 U.S. 153, 198 (1976)(Opinion of Stewart, Powell and Stevens, JJ.), quoting Coley v. State, 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974).

16/ Proffitt v. Florida, 428 U.S. 242, 253 (1976)(Opinion of Stewart, Powell and Stevens, JJ.).

17/ Woodson v. North Carolina, 428 U.S. 280, 303 (1976)(Opinion of Stewart, Powell and Stevens, JJ.).

to a new sentencing hearing at which the sentencer's discretion will be properly directed and channeled in accordance with Furman v. Georgia, 408 U.S. 238 (1972), Gregg v. Georgia, 428 U.S. 153 (1976), and Godfrey v. Georgia, supra. This significant constitutional issue was not addressed by the Georgia Supreme Court in its opinion.

Where, as in Georgia, the sentencing authority is the jury,[18/] Mr. Justice Marshall's concurrence in Godfrey answers that only a properly instructed jury may impose the sentence of death:

> The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the sentencer's discretion that must be channeled and guided by clear, objective, and specific standards. . . . To give the jury an instruction in the form of the bare words of the statute -- words that are hopelessly ambiguous and could be understood to apply to any murder . . . -- would effectively grant it unbridled discretion to impose the death penalty.

100 S.Ct. at 1769 (Marshall, J., concurring). The exercise of such unbridled discretion cannot be salvaged by appellate review. Here, as in Godfrey, "the standardless and unchanneled imposition of the death sentences in the uncontrolled discretion of a basically uninstructed jury . . . was in no way cured by the affirmance of those sentences by the Georgia Supreme Court." 100 S.Ct. at 1765 (Plurality opinion). As Mr. Justice Marshall stated:

> Such a defect could not be cured by the post hoc narrowing construction of an appellate court. The reviewing court can determine only whether a rational jury might have imposed the death penalty if it had been properly instructed;

18/ Ga. Code Ann. §27-2503(b).

> it is impossible for it to say whether a particular jury would have so exercised its discretion if it had known the law.

100 S.Ct. at 1769 (Marshall, J., concurring). Here, there was not even a "post hoc narrowing construction" by the Georgia Supreme Court. Instead, in upholding the (b)(7) finding of the jury upon remand from this Court, the Georgia Court substituted a new basis for the finding of that circumstance, one not put forward by either the state at trial or by the jury in its findings.[19/] It is well established that "[t]o conform to due process of law, petitioner[ ] [was] entitled to have the validity of [his] conviction appraised on consideration of the case as it was tried and as the issues were determined in the trial court." Cole v. Arkansas, 333 U.S. 196, 202 (1948); accord, Chiarella v. United States, ____U.S.____, 63 L.Ed.2d 348, 362 (1980); Shuttlesworth v. Birmingham, 382 U.S. 87, 91-92 (1965). This "fundamental principle[ ] of procedural fairness appli[es] with no less force at the peralty phase of a trial in a capital case than . . . in the guilt-determining phase of any criminal trial. Cf. Gardner v. Florida, 430 U.S. 349 (1977)." Presnell v. Georgia, 439 U.S. 14, 16 (1978). The Georgia Supreme Court's reassessment of petitioner's sentencing issues and its substitution of an alternate basis for sustaining the (b)(7) finding other than the one upon which the jury was instructed, relying only upon a cold record, and in the absence of statutory authority,[20/] plainly denied petitioner due process of law.

19/ As will be demonstrated infra at 21-24, the Georgia Supreme Court's definition of "torture" as applied to petitioner on remand is so broad as to apply to virtually any murder.

20/ The Supreme Court of Georgia is charged under Ga. Code Ann. §27-2537 with appellate review of sentences imposed by the trial court. No statutory provision gives that court power to act as a sentencing authority de novo in a capital case.

II. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER THE EXISTENCE OF MULTIPLE AGGRAVATING CIRCUMSTANCES WILL SUPPORT A SENTENCE OF DEATH EVEN THOUGH A DEFECTIVE AGGRAVATING CIRCUMSTANCE WAS A FACTOR IN THE SENTENCING DECISION.

Closely related to the issue discussed in the foregoing section of this petition is the question of whether the need for a new sentencing hearing is obviated where the sentence of death rests in part upon other aggravating circumstances beyond the one impermissibly considered. One basis for the Georgia Supreme Court's reaffirmance of petitioner's death sentence was the existence of statutory aggravating circumstances under Ga. Code Ann. §27-2534.1(b)(2) as well as the (b)(7) finding. Relying on its earlier decision in Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979), the court held that where two or more statutory aggravating circumstances are found by the jury, the failure of one does not so taint the proceedings as to invalidate the other aggravating circumstances. Opinion on remand at 1, App. at 1a; Gates v. State, supra at 598.

The question of whether petitioner may be denied a new sentencing hearing because of the existence of other statutory aggravating circumstances is an important constitutional question worthy of plenary consideration by this Court. At least three Justices of this Court have addressed the issue recently, and the question has divided state courts of last resort.

In dissenting from the denial of certiorari in Martin v. Louisiana, ____U.S.____, 49 U.S.L.W. 3370 (1980), Mr. Justice

Stewart stated the issue posed by the ambiguity of the jury findings and verdict of death in this case as well as the Louisiana case before the Court:

> Under the state death penalty statute . . . while the jury was permitted to impose capital punishment where it found only a single aggravating circumstance, it was not required to do so. . . . The Lousiana court's reasoning, therefore, ignores the possibility that some of the jurors may have voted for the death sentence because of the existence of the second aggravating circumstance alone, or that others may have voted for the death penalty only because of the existence of the two aggravating circumstances.
>
> The jury's verdict thus makes it impossible to determine whether some or all of the jurors may have relied on the existence of the second aggravating circumstance in reaching their decision to impose the sentence of death . . . .

49 U.S.L.W. at 3370-71. Mr. Justice Stewart found the same rationale applicable under the Georgia capital punishment scheme:

> [U]nder Georgia's capital punishment scheme, only the trial judge or jury can know and determine what to do when upon appellate review it has been concluded that a particular aggravating circumstance should not have been considered in sentencing the defendant to death.

Westbrook v. Balkcom, supra, 49 U.S.L.W. 3371 (Stewart, J., dissenting). Mr. Justice White and Mr. Justice Stevens also expressed their views in dissenting and concurring, respectively, with regard to the Court's action in the Westbrook cases.

Although dissenting because he would allow the Georgia Supreme Court to determine whether the death penalty should be sustained on aggravating circumstances other than the (b)(7) grounds, Mr. Justice White also expressed the view that the Georgia Supreme Court would not be constitutionally required to vacate the death sentences even if it failed to sustain the (b)(7) finding because the "cases now before us involve

only sentencing, not guilt or innocence, and there is no constitutional right to jury sentencing." 49 U.S.L.W. at 3371 (White, J., dissenting). However, in petitioner's case below, the Georgia Supreme Court did not purport to resentence petitioner, but to affirm a death sentence imposed by a jury based upon a combination of aggravating circumstances.21/

Mr. Justice Stevens, citing the holding of the Georgia Supreme Court in petitioner's case below, expressed the view that the Georgia court's holding on multiple aggravating circumstances is consistent with this Court's decision in Godfrey. 49 U.S.L.W. at 3371 (Stevens, J., concurring in the denial of certiorari).22/

Although normally denials of certiorari constitute no expression of an opinion on the merits, Brown v. Allen, 344 U.S. 433 (1953); Maryland v. Baltimore Radio Show, 338 U.S. 912, 919 (1950)(Frankfurter, J.); United States v. Carver, 260 U.S. 482, 490 (1923), this Court has acknowledged that in some instances "pointed dissents" and other actions by Justices with regard to denials of certiorari "surely are not without some significance as to [the Justices'] and the Court's attitude. . . ." United Stated v. Kras, 409 U.S. 434, 443 (1973). The conflicting views expressed in Martin and Westbrook contribute to the uncertainty as to whether the Constitution requires a new sentencing hearing upon a finding that a defective aggra-

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21/ Although the Georgia Supreme Court must review the imposition of every death penalty in Georgia, Ga. Code Ann. §27-2537 (1978), it holds no sentencing authority of its own. The Georgia statute provides that the trial court is the sentencing authority. Ga. Code Ann. §§ 27-2503(b), 27-2534.1(b).

22/ Godfrey v. Georgia, supra, however, involved only a finding under §(b)(7). There were no other aggravating circumstances in that case.

vating circumstance was a factor in the sentencer's decision. Because of the importance of this issue in the review of death penalty cases by state appellate courts, a decision on this question after briefing and arguments is needed.

There is a conflict among state courts of last resort on this question. The Florida Supreme Court held in Elledge v. State, 346 So.2d 998 (Fla. 1977) that a new sentencing hearing may be constitutionally required where a defective aggravating circumstance was taken into consideration in sentencing along with other properly considered circumstances. It expressed its reasoning as follows:

> [R]egardless of the existence of other authorized aggravating factors we must be on guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death. . . .
>
> . . .
>
> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which the [defective aggravating circumstance] shall not be considered. . . . This result is dictated because, in order to satisfy Furman v. Georgia . . . the sentencing authority's discretion must be "guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition. . . ."

346 So.2d at 1003 [emphasis in the original; citations omitted]. See also Riley v. State, 366 So.2d 19 (Fla. 1979); Lewis v. State, 377 So.2d 640, 646-47 (Fla. 1979).[23/]

23/ The Florida Supreme Court has also held that where the written order of the trial judge, who is the sentencing authority in Florida, expressly states the extent to which various factors went into the decision to impose death, a new hearing is unnecessary. Brown v. State, 381 So.2d 690, 696 (Fla. 1980). It has also held that where no mitigating circumstances are present, a new hearing may be unnecessary. See, e.g., Clark v. State, 379 So.2d 97, 104 (Fla. 1980); Jackson v. State, 359 So.2d 1190 (Fla. 1978); Gibson v. State, 351 So.2d 948, 953 (Fla. 1977).

The Louisiana Supreme Court has taken a different view. In State v. Williams, 383 So.2d 369 (La. 1980), the court refused to order a new sentencing hearing despite finding that two of the three aggravating circumstances were invalid. The dissent found such a position to stand at odds with the special appellate role contemplated in Gregg v. Georgia:

> Because of the qualitative difference between the death penalty and all others under the criminal law, a corresponding greater need for reliability exists in the determination that a defendant must die for his crimes. Lockett v. Ohio, 438 U.S. 586 (1978); Gardner v. Florida, 430 U.S. 349 (1977). Any error of the jury's finding of aggravating circumstances must be scrutinized according to whether such error introduced an element of arbitrariness and capriciousness into the jury recommendation of death, which renders the death sentence constitutionally impermissible.

383 So.2d at 376 (Dennis, J., dissenting).[24/]

The Georgia Supreme Court's conclusion on remand that petitioner's sentence rests upon independent grounds can only be based upon speculation. The jury found that because of the "armed robbery and rape and because the murder was wantonly vile . . . in that it involved depravity of mind to the victim," a sentence of death was appropriate.[25/] It is impossible to read this conjunctive verdict to mean that the jury would have still recommended the death penalty had it not found all the circumstances listed in the verdict. Had the jury utilized the word "or" rather than "and" in its finding of aggravating

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24/ It appears that Alabama requires a new hearing when one or more circumstances was improperly found while at the same time more than one of the circumstances was properly found. See Bufford v. State, 382 So.2d 1162 (Ala. Cr. App. 1980).

25/ Verdict, App. at 17a.

circumstances,[26] a conclusion that the verdict rests upon severable and independent grounds would be more tenable. Because only the jury knows why it sentenced petitioner to death, the question of how it would sentence the petitioner if properly instructed can only be answered by a new sentencing hearing.

Petitioner respectfully submits that because of the precision required by this Court's decision in Furman v. Georgia, supra, and Gregg v. Georgia, supra, in determining whether to impose the sentence of death, such speculation is not constitutionally permissible. Accordingly, this Court should grant certiorari to decide this issue after full briefing and arguments.

III. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE GEORGIA SUPREME COURT'S FAILURE TO PROVIDE PETITIONER A RIGHT TO BE HEARD ON REMAND VIOLATED HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The issues presented by this petition were not briefed or argued to the Supreme Court of Georgia because that court unilaterally reimposed the death penalty without briefs or arguments. This practice was followed by the Georgia court in all of those cases remanded to it at the same time as petitioner's case for review in light of Godfrey

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26/ Both the trial court's instructions and the verdict form separated the aggravating factors with "and/or." Trial court's instructions, App. at 14a-15a; Verdict Form, App. at 16a. Thus, the jury was specifically advised that it could indicate that its death sentence rested on independent grounds by use of the disjunctive.

v. Georgia,[27] as well as those cases decided prior to Godfrey but before transmittal of the remittitur to the trial court.[28] This Court should grant certiorari to determine whether such procedures are constitutionally sufficient.

This Court has cautioned that the "qualitative difference" under the Eighth Amendment between death and any other punishment requires a "corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific area." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). See also: Lockett v. Ohio, 438 U.S. 586, 601 (1978); Beck v. Alabama, ____U.S.____, 65 L.Ed.2d 392, 403 (1980). The cavalier summary disposition of petitioner's case on remand, without recognition or treatment of the important questions remaining after this Court's decision in Godfrey v. Georgia, supra, is inconsistent with this constitutional responsibility of the Georgia court.

Moreover, petitioner is entitled under the Sixth and Fourteenth Amendments to the effective assistance of counsel both in sentencing proceedings, Mempha v. Rhay, 389 U.S. 128 (1967); Townsend v. Burke, 334 U.S. 736 (1948), as well as on

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27/ This Court remanded five other Georgia capital cases to the Supreme Court in light of Godfrey in addition to petitioner's on May 27, 1980. Hamilton v. Georgia, ____U.S. ____, 64 L.Ed.2d 821 (1980); Baker v. Georgia, ____U.S. ____, 64 L.Ed.2d 820 (1980); Collins v. Georgia, ____U.S. ____, 64 L.Ed.2d 820 (1980); Davis v. Georgia, ____U.S. ____, 64 L.Ed.2d 819 (1980); Spraggins v. Georgia, ____U.S. ____, 64 L.Ed.2d 820 (1980). In each case the Supreme Court of Georgia reimposed a sentence of death without briefs or arguments. Petitioner is informed that each of these defendants has or intends to file a timely petition for a writ of certiorari raising issues similar to those presented by this petition.

28/ See, e.g., Mulligan v. State, ____Ga.____, ____S.E.2d____ (June 24, 1980), App. at 18a, Dampier v. State, ____Ga.____, ____S.E.2d____ (June 24, 1980), App. at 19a; Fair v. State, ____Ga.____, ____S.E.2d____ (June 24, 1980). App. at 22a. In each case the Georgia Supreme Court issued a brief "addendum" to its original opinion in which it distinguished the case under review from the facts of Godfrey and reaffirmed the death penalty.

appeal, Douglas v. California, 372 U.S. 353 (1963). To be meaningful, this right must include the right to brief and argue the important issues presented here to the Georgia Supreme Court before it reinstates the sentence of death.

In Gardner v. Florida, 430 U.S. 349, 358 (1977), this Court observed that it "is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on a reason rather than caprice or emotion." The Georgia Supreme Court, no less than any other judicial component in the awesome process of determining life and death, is held to a higher standard under the Constitution than it met in petitioner's case below.

IV. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE SUPREME COURT OF GEORGIA CONSTRUED OR APPLIED GA. CODE ANN. §27-2534.1(b)(7) IN AN UNCONSTITUTIONALLY VAGUE OR OVERBROAD MANNER IN PETITIONER'S CASE.

Assuming that the jury could properly find "depravity of mind to the victim" as an aggravating circumstance even though it was not instructed on such a circumstance,[29/] that phrase as well as the term "torture," which the Georgia Supreme

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29/ The jury was instructed with regard to only one of the subparts of section (b)(7), i.e., that the murder involved aggravated battery to the victim. In Godfrey v. Georgia, this Court pointed out that the term "aggravated battery" is defined in Ga. Code Ann. §26-1305: "A person commits aggravated battery when he maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof." Godfrey v. Georgia, supra, 100 S.Ct. at 1766 n. 13. The Georgia Supreme Court so defined aggravated battery in Hance v. State, supra, 268 S.E.2d at 345. In order to constitute aggravated battery, the bodily harm must occur before death. Id. There was no evidence presented to the jury in petitioner's case below that the victim was in any way deprived of a member of her body or seriously disfigured by petitioner prior to her death.

Court found in its analysis of the case upon remand were applied in a vague and overbroad fashion in this case.

In Holton v. State, 243 Ga. 312, 253 S.E.2d 736, 740 (1979), the Georgia Supreme Court observed:

> It is unlikely that a statutory aggravating circumstance which consisted solely that the murder involved depravity of the mind would survive constitutional challenge based on Furman v. Georgia . . . [because] such an aggravating circumstance could be so broad as to allow the death penalty to be imposed at random in any murder case.

Here, however, the Georgia court concluded that the "depravity of mind" finding was based on "torture" of the victim even though the jury verdict in no way suggests such a finding. Nor was there any argument by the prosecutor that the victim was tortured prior to her death. As Mr. Justice Marshall pointed out in his concurrence in Godfrey:

> The Georgia court has given an extraordinarily broad meaning to the word "torture." Under that court's view, "torture" may be present whenever the victim suffered pain or anticipated the prospect of death. . . . That interpretation would of course enable a jury to find a §(b)(7) aggravating circumstance in most murder cases.

Godfrey v. Georgia, supra, 100 S.Ct. at 1772 n. 12 (Marshall, J., concurring). The Georgia court's explanation of its conclusion in this case is certainly an example of its broad construction of the word "torture." In finding torture, the Georgia Supreme Court stated that "the victim died, not instantaneously, but a full two hours after being shot in the neck and abandoned by the appellant, death resulting from a slow but steady loss of blood." Brooks v. State, opinion on remand at 2, App. at 2a. Aside from the shooting itself, no evidence was presented at trial which would indicate that petitioner purposefully shot

the victim in the neck so as to cause unnecessary suffering prior to death. To the contrary, petitioner's statement to police introduced at trial that "the pistol went off and hit her," Tr. 759, is the only evidence of what transpired in the killing of the victim and suggests that the gun may have fired accidently.[30/]

The court also based its finding of torture on the fact that appellant "seriously and sexually abused" the victim and "taunted his victim with her lost virginity and made her the target of his gun." Opinion on remand at 2, App. at 2a. But there was no evidence of physical abuse beyond the forced sexual intercourse which formed the basis of the rape conviction,[31/] and the court's finding of "taunting" is apparently based upon petitioner's statement, "I asked her if that was

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30/ Thus, the finding of this case appears inconsistent with the Georgia court's statement that (b)(7) findings will be upheld only in cases that lie "at the core and not the periphery" of that aggravating circumstance. Harris v. State, 237 Ga. 718, 733, 230 S.E.2d 1, 11 (1976). The finding of "torture" by the court in this case contrasts sharply with the "horrifying torture-murder" in McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974), cited by this Court in Gregg, supra, 428 U.S. at 201, and Godfrey, supra, 100 S.Ct. at 1765. There the victim suffered prolonged torture in which she was beaten, burned, bitten, cut with a razor and scissors, sodomized, raped, and subjected to salt being placed in her wounds and hot wax dripped over her body before she was strangled and killed.

31/ Thus, this case did not involve the type of sexual abuse found in House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974), which was relied upon in Hance v. State, supra, for the proposition that serious sexual abuse may constitute serious physical abuse for the purpose of establishing torture under §27-2534.1(b)(7). Hance v. State, supra, 268 S.E.2d at 345. House involved the strangulation murder of two seven-year old boys following acts of anal sodomy committed upon them by the defendant.

the first time she had had sex, and she told me that it was, and I told her that I did not believe it."32/

While this episode is undeniably a revolting one, as is any rape and murder, it can only be characterized as "torture" under a construction of that term which is so broad and vague that it would apply to virtually any murder. Thus, "[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Georgia, supra, 100 S.Ct. at 1767. Therefore, this Court should grant certiorari to consider whether the provisions of Ga. Code Ann. §27-2534(b)(7) were applied to petitioner in violation of his rights under the Eighth and Fourteenth Amendments.

32/ Tr. at 759. Here the Supreme Court employs a strained characterization of the facts in its effort to analogize this case to Hance v. State, supra. In Hance, however, the victim was struck on the head with a karate chop and fell over bleeding. She was then pulled from the car with such force that her elbow was dislocated. Still alive, the victim was beaten with a tire iron so severely that her face was missing and parts of her skull were shattered at the time the body was discovered.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the decision of the Supreme Court of Georgia.

Respectfully submitted,

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No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

WILLIAM ANTHONY BROOKS,

Petitioner,

v.

STATE OF GEORGIA ,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for A Writ of Certiorari and a copy of the Appendix to said Petition has been mailed, postage prepaid, to Mr. William Smith, Esq., District Attorney, Government Building, Columbus, Georgia, 31901, and to Mr. Arthur Bolton, Attorney General, Judicial Building, State of Georgia, Atlanta, Georgia, 30334, this 8th day of December, 1980.

Stephen B. Bright

In the Supreme Court of Georgia

Decided: SEP 8 1980

34813. BROOKS v. THE STATE.

JORDAN, Presiding Justice.

The United States Supreme Court vacated the death sentence affirmed by this court in Brooks v. State, 244 Ga. 574 (261 SE2d 379) (1979), and remanded said case to this court for reconsideration in light of the discussion of Code Ann. § 27-2534.1(b)(7) in Godfrey v. Georgia, 48 U.S. LW 4541 (May 19, 1980). Brooks v. State, U.S. (May 27, 1980).

Having reconsidered the facts of the present case as directed, this court now reaffirms on two, independent grounds, the appellant's sentence of death for the murder of Carol Jeannine Galloway.

First, in the present case, the jury's verdict for the death sentence was predicated, not only on Code Ann. § 27-2534.1(b)(7), but also on Code Ann. § 27-2534.1(b)(2) (The jury found, beyond a reasonable doubt, that the murder was committed during the appellant's commission of a rape and an armed robbery).

"Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death based thereon." Gates v. State, 244 Ga. 587, 598 (261 SE2d 349) (1979).

Therefore, we reaffirm the appellant's sentence of death on the ground that the jury's finding of Code Ann. § 27-2534.1(b)(2) was supported by legally sufficient evidence.

Moreover, in the present case, the jury found that the appellant's murder of Ms. Galloway reflected, beyond a reasonable doubt, "depravity of mind" under Code Ann. § 27-2534.1(b)(7)

and "when only facts occurring prior to death are relied upon..., the fact that the victim was tortured will...support a finding of depravity of mind...." Hance v. State, Case No. 36102, decided June 24, 1980.

Torture occurs when the victim is subjected to serious physical abuse before death. Godfrey v. Georgia, Slip Opinion, p. 10; Hance v. State, Case No. 36102, decided June 24, 1980.

In the present case, the victim died, not instantaneously, but a full 2 hours after being shot in the neck and abandoned by the appellant, death resulting from a slow but steady loss of blood.

Also, it is beyond question that the appellant seriously and sexually abused Ms. Galloway. See Hance v. State, supra, (physical abuse includes sexual abuse for purposes of proving torture under Code Ann. § 27-2534.1(b)(7)).

Finally, following his rape of Ms.Galloway, the appellant taunted his victim with her lost virginity and made her the target of his gun, said acts combining to cause her to scream uncontrollably. See Hance v. State, supra (physical abuse includes psychological abuse resulting in mental anguish to the victim in anticipation of physical harm.).

Accordingly, this court reaffirms the appellant's sentence of death on the ground that, unlike the jury's finding of Code Ann. § 27-2534.1(b)(7) in Godfrey v. State, the jury's finding of said statutory aggravating circumstance in the present case was supported by legally sufficient evidence.

Judgment of affirmance of the death penalty adhered to. All the Justices concur, except Hill, J., who concurs specially.

HILL, Justice, concurring specially.

I concur specially for the reasons stated in Gates v. State, 244 Ga. 587 (7)(8) (261 SE2d 349) (1979).

244 Ga. 574

BROOKS

v.

The STATE.

No. 34813.

Supreme Court of Georgia.

Argued May 15, 1979.

Decided Oct. 30, 1979.

Defendant was convicted before the Muscogee Superior Court, Land, J., of murder, kidnapping, rape and armed robbery and was sentenced to death for the murder, and he appealed. The Supreme Court, Jordan, J., held that: (1) evidence was sufficient to sustain conviction; (2) totality of circumstances surrounding trial were not inherently prejudicial to defendant's right to impartial jury; (3) trial judge did not abuse his discretion in admitting photograph of teeth marks on victim's breast into evidence; (4) sustaining of district attorney's objections to questions asked of defendant's mother and sisters during sentencing phase of case was not error; (5) finding that there were aggravating circumstances, which consisted of murder while defendant was engaged in commission of rape and armed robbery, and murder outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind was supported by sufficient evidence; and (6) death sentence was neither excessive nor disproportionate to penalty im-

posed for similar crimes, considering the crime and the defendant.

Judgment affirmed.

Hill, J., concurred in judgment only.

1. Homicide ⇐250
Kidnapping ⇐5
Rape ⇐51(1)
Robbery ⇐24.1(1)

Evidence, including defendant's confessions, was sufficient to sustain his convictions of murder, kidnapping, rape, and armed robbery.

2. Criminal Law ⇐1134(1)

Appellate courts must independently review relevant trial court record in each case to insure compliance with constitutional dictates assuring that accused be afforded a public and speedy trial by impartial jury. U.S.C.A.Const. Amend. 6; Const. art. 1, § 1, par. 11.

3. Jury ⇐97(1)

To establish denial of an accused's right to impartial jury under Sixth Amendment, he must show either actual juror partiality or circumstances inherently prejudicial to that right. U.S.C.A.Const. Amend. 6.

4. Jury ⇐97(1)

Circumstances inherently prejudicial to accused's right to impartial jury can impeach a jury's declaration of impartiality. U.S.C.A.Const. Amend. 6; Const. art. 1, § 1, par. 11.

5. Jury ⇐99(1)

Potential for prejudice, arising from a juror's extrajudicial knowledge regarding accused's crime, can be discounted under Sixth Amendment if review of pretrial publicity and total voir dire fails to demonstrate that the "totality of the circumstances" were inherently prejudicial. U.S.C.A. Const. Amend. 6.

6. Jury ⇐99(3)

Totality of circumstances surrounding trial in which defendant was convicted of murder, kidnapping, rape and armed robbery and was sentenced to death were not inherently prejudicial to defendant's right to impartial jury where, though seven jurors had extrajudicial knowledge of the crime, five jurors knew that defendant had confessed and two jurors were acquainted with victim's family, there had been two and one-half-month delay between the pretrial publicity and trial, voir dire indicated a low level of community bias and the confessions were admitted into evidence. U.S.C.A.Const. Amend. 6; Const. art. 1, § 1, par. 11.

7. Jury ⇐99(1)

In order to invoke Sixth Amendment's presumption of juror partiality on ground of inherently prejudicial pretrial publicity, accused must show a trial atmosphere utterly corrupted by press coverage. U.S.C.A.Const. Amend. 6.

8. Criminal Law ⇐633(1)

Mere fact of a televised criminal trial does not constitute evidence that pretrial publicity, which is insufficient to sustain a finding that accused has been denied his right to an impartial trial, has been joined by media theatrics sufficient to convert totality of the courtroom circumstances into a "circus," and thereby deprive accused of his right to courtroom calm. U.S.C.A.Const. Amend. 6; Const. art. 1, § 1, par. 11.

9. Criminal Law ⇐531(1)

When an accused objects to admission of evidence of his confession, state must prove, by a preponderance of the evidence, that confession was voluntary and, if confession is product of a custodial interrogation by government officers, that the confession was preceded by appellant's knowing and voluntary waiver of his *Miranda* rights.

10. Criminal Law ⇐260.11(3)

On appellate review, factual and credibility determinations by trial court must be accepted unless such determinations are clearly erroneous.

11. Criminal Law ⇐1158(4)

Supreme Court must independently review evidence to determine whether state has carried its burden of proving admissibil-

ity of accused's confession by a preponderance of the evidence.

12. Criminal Law ⇐531(3)

In proceeding in which defendant was convicted of murder, kidnapping, rape and armed robbery, evidence sufficiently established admissibility of defendant's confession.

13. Criminal Law ⇐438(1), 1153(1)

Photograph, which is relevant to a material fact, is admissible in evidence if authenticated and if possessed of a probative value not substantially outweighed by probative danger; such determinations are assigned to sound discretion of trial judge and will not be disturbed on appeal except for abuse of that discretion.

14. Criminal Law ⇐438(5)

In proceeding in which defendant was convicted of murder, kidnapping, rape and armed robbery, trial judge did not abuse his discretion in ruling that photograph depicting presence of teeth marks on victim's breast rendered the material fact of force more probable than it would have been without the photograph and did not abuse his discretion in admitting photograph into evidence.

15. Criminal Law ⇐338(1)

"Relevancy" is the tendency to establish any material fact.

See publication Words and Phrases for other judicial constructions and definitions.

16. Homicide ⇐354

In proceeding in which defendant was convicted of murder, kidnapping, rape and armed robbery and was sentenced to death for the murder, sustaining of district attorney's objections to certain questions asked of defendant's mother and his sisters during sentencing phase of trial was not error, in light of fact that such witnesses, despite the sustained objections, were able to convey to jury the circumstances concerning defendant's premature birth, fact that he was raised in broken home and was severely beaten and mistreated by stepfather, his early offenses as a juvenile and other matters which could be considered as mitigating circumstances.

17. Criminal Law ⇐986.2(1)

Evidence as to mitigation should not necessarily be confined to strict rules of evidence in criminal proceeding; trial court should exercise a broad discretion in allowing any evidence reasonably tending toward mitigation but court is authorized to hold witnesses within reasonable bounds.

18. Homicide ⇐354

In proceeding in which defendant was convicted of murder, kidnapping, rape and armed robbery and was sentenced to death for the murder, jury's finding that there were aggravating circumstances, which consisted of murder while offender was engaged in commission of rape and armed robbery and murder outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind, was supported by sufficient evidence. Code, § 27-2537(c)(1-3).

19. Criminal Law ⇐1206(2)
Homicide ⇐354

Death sentence for unprovoked murder committed by defendant during commission of armed robbery, kidnapping and rape was neither excessive nor disproportionate to penalty imposed for similar crimes, considering the crime and defendant. Code, § 27-2537(c)(1-3).

William S. Cain, Jr., Columbus, for appellant.

William J. Smith, Dist. Atty., Arthur K. Bolton, Atty. Gen., Daryl A. Robinson, Asst. Atty. Gen., for appellee.

JORDAN, Justice.

Appellant-defendant, William Anthony Brooks, was indicted on August 16, 1977, by the Muscogee County grand jury for the crimes of murder, kidnapping, rape, and armed robbery. On Nov. 18, 1977, the jury found appellant guilty on all four counts, and after specifically finding the existence of statutory aggravating circumstances, recommended the death penalty for the

crime of murder. Accordingly, the trial court, on Nov. 18, 1977, sentenced the appellant to death for the crime of murder, to life for kidnapping and rape, and to twenty years for armed robbery. The case is here on appeal and mandatory review of the death penalty.

I. The Evidence.

A summary of the evidence is as follows: On the morning of July 15, 1977, the appellant, while walking along Saint Mary's Road in Muscogee County, Georgia, noticed Carol Jeannine Galloway, age 23, in the frontyard of her parents' residence. The appellant accosted Miss Galloway at gunpoint with instructions that she get into her car, valued at $3,508, and drive the two of them to the Dawson Elementary School, one mile from the Galloway home. Upon arriving at the school, the appellant ordered Miss Galloway to park the car and walk into the nearby woods where he first robbed Miss Galloway of at least $20 and then raped her. Following appellant's completion of the sex act, Miss Galloway reiterated her continuing plea that appellant permit her to leave. Appellant's sole response was to ask Miss Galloway if she had ever experienced sex before, and when told by Miss Galloway that she had not, to taunt her with his disbelief. At this point, Miss Galloway began to scream. When she did not heed his warning to stop, the appellant, to impress upon Miss Galloway the seriousness of his warning, aimed his gun at her face and pulled the hammer back into a cocked position. When Miss Galloway continued to scream, the appellant fired one shot, his bullet piercing Miss Galloway's lower neck and causing a slow but steady loss of blood which resulted (but only after the passage of a full two hours) in her death. Immediately after firing the shot, the appellant returned to Miss Galloway's car. As he was driving out of the school yard he encountered Bobby Murray, Miss Galloway's boyfriend, driving in search of Miss Galloway. In his successful effort to elude Mr. Murray the appellant abandoned his victim's car and caught a ride to the East Wynnton section of Columbus where he spent the night with friends. On July 21, 1977, having spent the interim at his father's home in Columbus, the defendant fled to Atlanta, Georgia, there to be arrested on August 11, 1977. He made confessions to the crimes which were introduced into evidence.

[1] This court holds the evidence in support of the verdicts legally sufficient since under such evidence any rational trier of fact could have found that the appellant was guilty beyond a reasonable doubt of each and every crime charged. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

II. Enumerations of Error.

On appeal, appellant enumerates five errors: his motion for change of venue was overruled, his right to an impartial jury was denied, his two confessions and state's Exhibit # 17 (a photograph of teethmarks on the victim's left breast) were erroneously admitted into evidence, and the award of the death penalty was motivated by prejudice and passion.

1. For purpose of argument, appellant combines enumerations of error one and two into a single contention: the trial court erred in overruling his motion for change of venue based upon prejudicial pretrial publicity since the consequence of such denial was to deprive appellant of his right to trial by an impartial jury. Appellant's motion was supported by the introduction into evidence of 26 articles published by Columbus' two local newspapers between July 15, 1977, the date of commission of the crime, and August 23, 1977, twelve days after appellant had been arrested. The record contains no article published during the two and two-thirds months immediately preceding appellant's trial on Nov. 15, 1977; however, the transcript reflects that one article was published on Nov. 14, 1977, the very eve of the trial, wherein it was restated that appellant had confessed to the indicted crimes (the original statement, published August 14, 1977, also quoted from the text of the confession). Additional facts will be noted as necessary to the discussion.

The Sixth Amendment to the U.S. Constitution U.S.Const. Amend. VI) combines with Code Ann. § 2-111 (Ga.Const. Art. I, Sec. I, Par. XI) to assure that every person charged with offending the laws of this state shall have a public and speedy trial by an *impartial* jury.

[2] Appellate courts must independently review the relevant trial court record in each case to insure compliance with these constitutional dictates. *Sheppard v. Maxwell*, 384 U.S. 333, 362, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1965); *United States v. McNally*, 485 F.2d 398, 403 (8th Cir. 1973), cert. den., 415 U.S. 978, 94 S.Ct. 1566, 39 L.Ed.2d 874 (1974); *United States v. Yeager*, 472 F.2d 229, 239 (3rd Cir. 1973).

[3] We note that, under the Sixth Amendment, in order for an appellant to establish the denial of his right to an impartial jury, he must show either (a) *actual* juror partiality or (b) circumstances *inherently prejudicial* to that right. *Murphy v. Florida*, 421 U.S. 794, 803, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1974); *Street v. State*, 237 Ga. 307, 311, 227 S.E.2d 750 (1976), vacated on other grounds, 429 U.S. 995, 97 S.Ct. 520, 50 L.Ed.2d 606 (1976).

(a) The United States Supreme Court has defined actual juror partiality as follows:

"It is not required, however, that jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread, and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that there mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642-1643, 6 L.Ed.2d 751 (1960). Accord, *Coleman v. State*, 237 Ga. 84, 87, 226 S.E.2d 911 (1976), cert. den., 431 U.S. 909, 97 S.Ct. 1707, 52 L.Ed.2d 394 (1977).

In this present case, all twelve selected jurors testified on voir dire that they were without a fixed opinion as to appellant's guilt or innocence. The appellant protests, however, that this formal declaration of impartiality was impeached, in the case of one juror, by her admission that she held an "undecided" opinion as to the appellant's guilt based upon newspaper accounts of the columbus police department's certainty that the appellant was Miss Galloway's assailant. This same juror, however, testified in explanation of the above that she understood the police made mistakes and that her "undecided" opinion would not preclude her from deciding appellant's guilt or innocence solely on the evidence presented at trial.

[4] (b) Circumstances inherently prejudicial to the appellant's right to an impartial jury can impeach a juror's declaration of impartiality. As evidence of the presence of such circumstances in the present case, the appellant notes that 7 of the 12 selected jurors had knowledge of the crime, and that 5 of the 12 knew appellant had confessed (though only 1 of these 5 acknowledged even the possibility of recalling the details of the confession.) The appellant also notes that 2 of the twelve selected jurors were acquainted with the victim's family—one by reputation, the other by a single introduction several years prior to trial.

[5] We are aware that a juror's extrajudicial knowledge regarding an appellant's present crime represents a serious potential for prejudice to that appellant's right to an impartial jury. However, such potential can be discounted under the Sixth Amendment if review of the pretrial publicity and total voir dire fails to demonstrate that the "totality of the circumstances" were inherently prejudicial. *Murphy v. Florida*, supra.

We have held that a juror's extrajudicial knowledge of the victim, even when manifested by attendance at the victim's funer-

al, did not impeach per se that juror's declaration of impartiality. *Coleman v. State*, supra. Accordingly, we hold that, while a juror's extrajudicial knowledge regarding an appellant's crime, confession, and victim does indeed represent a serious potential for prejudice to that appellant's right to an impartial jury, such potential can be discounted under the Sixth Amendment if review of the pretrial publicity and total voir dire fail to demonstrate that "the totality of the circumstances" were inherently prejudicial.

[6] In review of the pretrial publicity attending his case the appellant stresses, in addition to the sheer number of newspaper publications (26), the publication of parts of his confession, after the confession had been read into the public record at the appellant's preliminary hearing. The appellant further notes the emotionalism of the coverage, citing, in particular, one headline which read "Congregation Weeps For Its Slain Young Organist", one editorial which commented that the murder of Miss Galloway had struck an especially responsive cord in the community, and, one photograph of the appellant captioned by the statement of the District Attorney that he intended to seek the death penalty at trial.

In *Stroble v. California*, 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872 (1951), the United States Supreme Court considered a pattern of pretrial publicity strikingly similar to the one in the present case. In upholding Stroble's conviction, the court stated: "He (the defendant) asks the Court simply to read those stories and then to declare, over the contrary finding of two state courts, that they *necessarily* deprived him of due process. That we cannot do, at least where, as here, *the inflammatory newspaper accounts* appeared approximately *six wks. before the beginning of petitioner's* trial, and there is no affirmative showing that any community prejudice ever existed or in any way affected the deliberation of the jury. *It is also significant that* in this case *the confession* which was one of the most prominent features of the newspaper accounts was *made voluntarily and* was *introduced in evidence at the trial itself.*" (Emphasis added). Thus, after observing the absence of any evidence of actual juror prejudice, the United States Supreme Court noted the remoteness in time between publicity and trial and the eventual admission of the prejudicial information into evidence as support for its refusal to hold that the appellant's right to an impartial jury had been presumptively violated. See *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 554, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1975); *United States v. Mancusi*, 445 F.2d 613, 618 (2nd Cir. 1971). The same set of circumstances exists in the present case. There is an absence of any evidence of actual juror partiality. (See Part II, Division 1(a) of this opinion). Further, all but one of the 26 articles were published 2½ months before the appellant's trial and at trial the appellant's confessions were found to be voluntary and admitted into evidence. Accordingly, this court concludes that the pretrial publicity surrounding the appellant's trial did not constitute a circumstance inherently prejudicial to the appellant's Sixth Amendment right to an impartial jury.

[7] This court is not unaware of *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963), wherein the United States Supreme Court found that the circumstance of a confession, televised 3 times approximately 2 months prior to the trial and never admitted into evidence, did demonstrate inherent prejudice to the appellant's right to an impartial jury. That same court, however, in *Nebraska Press Assn. v. Stuart*, supra, made clear the continued vitality of *Stroble*, and the limited holding of *Rideau*. In order to invoke the Sixth Amendment's presumption of juror partiality on the ground of inherently prejudicial pretrial publicity, an appellant must show "a trial atmosphere . . . *utterly corrupted* by press coverage." *Murphy*, supra, 421 U.S. at 798, 95 S.Ct. at 2033. (Emphasis supplied.) Given the facts before this court, the present appellant has failed his burden.

Regarding review of the total voir dire, the United States Supreme Court suggested

in *Murphy* that corroboration for a court's belief the pretrial publicity had not been inherently prejudicial could be found in the percentage of prospective jurors excused for partiality regarding the appellant's guilt. In the present case, only 4% (3 out of 75) of the prospective jurors were excused for partiality regarding the defendant's guilt. This very low percentage firmly reinforces our earlier conclusion that the pretrial publicity surrounding the appellant's case did not create a community bias inherently prejudicial to the appellant's right to an impartial jury. See *Coleman*, supra (49% dismissal rate—38 out of 77—held to corroborate absence of inherently prejudicial community bias); *Butler v. State*, 231 Ga. 276, 277, 201 S.E.2d 448 (1973) (36% dismissal rate—28 out of 77—held to corroborate absence of inherently prejudicial community bias); Cf. *Murphy*, supra, at 803, 95 S.Ct. 2031 (62% dismissal rate—268 out of 430—held to corroborate the presence of actual juror partiality).

We note, in regard to the credibility of the above low percentage, that the trial court in this case conducted the individual voir dire of each prospective juror out of the presence of the others, and thereby eliminated the danger that sincere jurors might be influenced to misstate their true feelings if asked, in the presence of their peers, to acknowledge their bias.

[8] In conclusion, we hold that the 2½ month period between the publicity and the trial, the low level of community bias as reflected in the total voir dire, and the admission into evidence of the defendant's confessions permit this court to discount the potential for prejudice admittedly present in the extrajudicial knowledge of the selected jurors in this case, and to find that the "totality of circumstances" surrounding the appellant's trial were not inherently prejudicial to the appellant's right to an impartial jury. These two enumerations are without merit.[1]

[9] 2. When an appellant objects to the admission into evidence of his confession, the state must prove, by a preponderance of the evidence, *Lego v. Twomey*, 404 U.S. 477, 489, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972); *United States v. Watson*, 469 F.2d 362, 364 (5th Cir. 1972); *High v. State*, 233 Ga. 153, 154, 210 S.E.2d 673 (1974), that the confession was voluntary, and, if the confession is the product of a custodial interrogation by officers of the government, that the confession was preceded by the appellant's knowing and voluntary waiver of his *Miranda* rights. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *Goodwin v. State*, 236 Ga. 339, 342, 223 S.E.2d 703 (1976).

[10] On appellate review, factual and credibility determinations by the trial court must be accepted unless such determinations are clearly erroneous. *United States v. Watson*, supra; *Johnson v. State*, 233 Ga. 58, 209 S.E.2d 629 (1974).

[11, 12] It is the duty of this court to independently review the evidence to determine whether the state has carried its burden of proving the admissibility of appellant's confession by a preponderance of the evidence. *United States v. Watson*, supra. Having done so, we firmly conclude that the state has carried its burden. See *Hurt v. State*, 239 Ga. 665, 669, 238 S.E.2d 542 (1977); *Stevens v. State*, 222 Ga. 603, 151 S.E.2d 127 (1966). See generally *West v. U. S.*, 399 F.2d 467, 469 (5th Cir. 1968), cert. den., 393 U.S. 1102, 89 S.Ct. 903, 21 L.Ed.2d 795 (1969); *Riley v. State*, 237 Ga. 124, 128, 226 S.E.2d 922 (1976).

1. Appellant, in his brief to this court, mentions the presence of television in the courtroom. We note here that the mere fact of a televised trial does not constitute evidence that the pretrial publicity surrounding the defendant's trial, which we have above held insufficient to sustain a finding that the appellant was denied his right to an impartial jury, was joined by media theatrics sufficient to convert the totality of courtroom circumstances into a "circus", and thereby deprive the appellant of his right to courtroom calm as enunciated by the United States Supreme Court in *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966) and *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1964). We also note that appellant consented to the television coverage of his trial.

3. Dr. Joe Martin Webber testified at trial that he had observed a series of teethmarks on Miss Galloway's left breast during performance of the autopsy on July 16, 1977. He was shown the state's original Exhibit # 17 and asked if he could recognize from it the teethmarks he had observed during the autopsy. After responding negatively, Dr. Webber produced a photograph which he testified was a true and correct representation of Miss Galloway's breast area at the time he had taken the photograph. Following substitution of the doctor's photograph as the new state's Exhibit # 17, said exhibit was admitted into evidence over the following objections by the defendant: first, that the photograph was irrelevant by virtue of Dr. Webber's failure to testify when the marks had been made, whether they were inflicted violently, or whether they were inflicted by man, woman, or child, much less this particular defendant; and, second, that given the photograph's cumulative evidentiary value (Dr. Webber having already testified to what the photograph showed), its probative worth was so outweighed by its probative danger that its exclusion from the jury was demanded.

[13] Georgia law provides that a photograph, relevant to a material fact, is admissible in evidence if authenticated and if possessed of a probative value not substantially outweighed by probative danger. *Floyd v. State*, 233 Ga. 280, 283, 210 S.E.2d 810 (1974); see *Shaw v. State*, 241 Ga. 308, 311, 245 S.E.2d 262 (1978). Further, the above determinations are assigned to the sound discretion of the trial judge and will not be disturbed on appeal except for abuse of that discretion. *Thornton v. Thornton*, 232 Ga. 666, 667, 208 S.E.2d 557 (1974); *J. D. Jewell, Inc. v. Hancock*, 226 Ga. 480, 487, 175 S.E.2d 847 (1970).

[14] In this case, appellant was indicted for the crime of rape, which Georgia law defines as carnal knowledge of a female, forcibly and against her will. Thus, a material fact in issue before the jury was whether the defendant had achieved carnal knowledge of Miss Galloway *by force*. We hold the trial judge did not abuse his discretion in ruling that state's Exhibit # 17, depicting the presence of teethmarks on Miss Galloway's left breast, rendered the material fact of force more probable than it would have been without the evidence.

[15] In objecting to the photograph because Dr. Webber did not testify when the teethmarks had been made or whether they had been inflicted by a man, woman, or child, appellant seems to demand, as a condition to admissibility, that the photograph be relevant to *who* raped Miss Galloway. Relevancy is the tendency to establish *any* material fact. In objecting that Dr. Webber did not state whether the teethmarks were inflicted violently, defendant raises a point that would be more persuasive if his objection were to either the sufficiency of the photograph, a question of law for the court, or the weight of the photograph, a question of persuasion for the jury. Green, Georgia Law of Evidence, 194–196 § 82 (1957). It is not persuasive in an objection to the photograph's relevancy.

The trial judge in the case before us did not abuse his discretion in admitting the photograph. *Lamb v. State*, 241 Ga. 10, 12, 243 S.E.2d 59 (1978); *Reddish v. State*, 238 Ga. 136, 139, 231 S.E.2d 737 (1977).

III. Sentence Review.

4. In reviewing the charge of the court in the sentencing phase of the trial relating to circumstances in mitigation and aggravation, we conclude that this portion of the charge clearly meets the criteria laid down in *Fleming v. State*, 240 Ga. 142(7), 240 S.E.2d 37 (1977); *Hawes v. State*, 240 Ga. 327(9), 240 S.E.2d 833 (1978); and *Spivey v. State*, 241 Ga. 477(2), 246 S.E.2d 288 (1978), cert. den. 439 U.S. 1039, 99 S.Ct. 642, 58 L.Ed.2d 699 (1978).

[16] 5. A review of the evidence during the sentencing phase of the trial shows that the defendant called his mother and two sisters as witnesses in an attempt to show mitigating circumstances in his behalf. During the testimony of these witnesses, the district attorney made numerous

objections based on hearsay, irrelevancy, conclusion of the witness, etc., most of which were sustained by the court. In response to defense counsel's statement that "I thought the rules were much more liberal on the sentencing phase," the court replied ". . . its got to be admissible evidence." The court overruled one objection and told counsel to "keep her within reasonable bounds."

We find no error under the facts of this case since the witnesses, despite the objections which were sustained, were able to convey to the jury the circumstances concerning the defendant's premature birth, being raised in a broken home, severely beaten and mistreated by a stepfather, his early offenses as a juvenile, and other matters which the jury might consider as mitigating circumstances.

[17] This court is of the opinion that evidence as to mitigation should not necessarily be confined to the strict rules of evidence. The trial court should exercise a broad discretion in allowing *any* evidence reasonably tending toward mitigation. Of course the court is authorized to hold witnesses "within reasonable bounds," as was done in this case. See *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979).

6. Appellant's final enumeration of error raises the same issue as the first third of this court's mandatory death sentence review as outlined in Code Ann. § 27-2537(c)(1-3) (Ga.L.1973, p. 159); accordingly, it shall be incorporated into this section's fulfillment of the cited statutory duty.

First, we conclude that the sentence of death imposed in this case for the crime of murder was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

[18] Secondly, we conclude that the statutory aggravating circumstances found by the jury (murder while the offender was engaged in the commission of rape and armed robbery; and murder outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind to the victim (sic)) were supported by sufficient evidence. (Regarding rape and armed robbery, see Part I of this opinion; regarding depravity of mind). See *Johnson v. State*, 242 Ga. 649, 656, 250 S.E.2d 394 (1978).

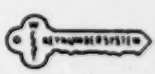
[19] Thirdly, in reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed and we find that the cases listed in the appendix support affirmance of the death penalty. This case involves an absolutely unprovoked murder while the appellant was in the commission of armed robbery, kidnapping, and rape. William Anthony Brooks' sentence to death is neither excessive nor disproportionate to the penalty imposed in similar crimes considering the crime and the appellant.

Judgment affirmed.

All the Justices concur, except as to Division 6, HILL, J., concurs in the judgment only.

APPENDIX

House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974); *Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974); *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1975); *Floyd v. State*, 233 Ga. 280, 210 S.E.2d 810 (1975); *Mitchell v. State*, 234 Ga. 160, 214 S.E.2d 900 (1975); *Jarrell v. State*, 234 Ga. 410, 216 S.E.2d 258 (1975); *Berryhill v. State*, 235 Ga. 549, 221 S.E.2d 185 (1975); *Gibson v. State*, 236 Ga. 874, 226 S.E.2d 63 (1976); *Dobbs v. State*, 236 Ga. 427, 224 S.E.2d 3 (1976); *Goodwin v. State*, 236 Ga. 339, 223 S.E.2d 703 (1976); *Pulliam v. State*, 236 Ga. 460, 224 S.E.2d 8 (1976); *Morgan v. State*, 241 Ga. 485, 246 S.E.2d 198 (1978); *Drake v. State*, 241 Ga. 583, 247 S.E.2d 57 (1978).



Georgia, Muscogee County:

In Re: State of Georgia vs William Anthony Brooks

Charge of Murder

Ladies and Gentlemen, the defendant in this case has been found guilty of the offense of Murder, and it is now your duty to make certain decisions that will affect the sentence which the Court will impose as punishment for that offense.

Under the law of this state every person found guilty of Murder shall be punished by death or imprisonment for life.

I charge you that although, under the law of Georgia, the Judge will fix the sentence, the determinations you will now make will affect the sentence which will be prescribed.

Your responsibility at this stage of the trial is to determine first whether any mitigating or aggravating circumstances existed at the time the Murder was committed, which would authorize you to recommend the death penalty for the defendant.

Before you would be authorized to recommend the death penalty, you must first determine whether, at the time the crime was committed, the following statutory aggravating circumstances existed beyond a reasonable doubt:

I.

"The offense of Murder was committed while the offender was engaged in the commission of another capital felony, to-wit: Rape

and/or

II.

"The offense of Murder was committed while the offender was engaged in the commission of another capital felony, to-wit: Armed Robbery

and/or

III.

"The offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved an aggravated battery to the victim."

If you find that either of these aggravating circumstances existed beyond a reasonable doubt and if you recommend the death penalty, then the Court is required by law to sentence the defendant to death.

On the other hand, you can see fit, whether aggravating circumstances existed or not to recommend mercy for the defendant if this should be your finding, then the Court is required by law to sentence the defendant to life imprisonment.

In arriving at your determinations, you are authorized to consider all the evidence received throughout this trial presented by the State and the defendant. You are authorized to include in your consideration the facts and circumstances, if any, in mitigation and aggravation.

Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reduci the degree of moral culpability or blame.

Aggravating circumstances are those which increase the guilt or enormity of the offense or add to its injurious consequences.

Now, Ladies and Gentlemen, the form of your verdict fixing punishment would be one of the following and should read:

I.

"The offense of Murder was committed while the offender was engaged in the commission of another capital felony, to-wit: Rape, and we recommend the death penalty."

and/or

II.

"The offense of Murder was committed while the offender was engaged in the commission of another capital felony, to-wit: Armed Robbery, and we recommend the death penalty."

and/or

III.

"The offense of Murder was outrageously or wantonly vile, horrible or inhuman in that it involved an aggravated battery to the victim, and we recommend the death penalty."

Now, Ladies and Gentlemen, eventhough you find statutory aggravating circumstances to exist you may refuse to recommend the death penalty in which event the Defendant would receive a sentence of Life Imprisonment.

Should you fail to find aggravating circumstances then the form of your verdict would be "We, the Jury, recommend mercy."

Should this be your verdict, it would mean that the Court would sentence the defendant to Life Imprisonment.

Your decision must be unanimous, must be in writing on the indictment, dated and signed by the Foreman.

You may now retire and consider your verdict.

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	)	INDICTMENT NO. 38888
VS	)	MURDER
WILLIAM ANTHONY BROOKS	)	

AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED BY THE JURY:

I.

The offense of Murder was committed while the offender was engaged in the commission of another capital felony, to-wit: Armed Robbery.

and/or

II.

The offense of Murder was committed while the offender was engaged in the commission of another capital felony, to-wit: Rape.

and/or

III.

The offense of Murder was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind to the victim.

VERDICT

We, the Jury find the following aggravating circumstances:

_____

_____

_____

_____

And we do not recommend the Death Penalty.

This 18th day of November, 1977.

_____

FOREMAN

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	)	INDICTMENT NO. 38888
	)	
VS	)	MURDER
	)	
WILLIAM ANTHONY BROOKS	)	

AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED BY THE JURY:

I.

The offense of Murder was committed while the offender was engaged in the commission of another capital felony, to-wit: Armed Robbery.

and/or

II.

The offense of Murder was committed while the offender was engaged in the commission of another capital felony, to-wit: Rape.

and/or

III.

The offense of Murder was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind to the victim.

VERDICT

We, the Jury find the following aggravating circumstances: Armed Robbery and Rape and the Crime of Murder was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind to the victim

And we recommend the Death Penalty.

This 18th day of November, 1977.

William T. Mustin
FOREMAN

In The Supreme Court of Georgia

Decided: JUN 24 1980

35314. MULLIGAN v. THE STATE.

ADDENDUM

We reexamine, in light of Godfrey v. State, 48 LW 4541 (May 19, 1980), our holding in the present case that the evidence supports a reasonable trier of fact's finding, beyond a reasonable doubt, that the appellant's murder of Ms. Miller was "outrageously or wantonly vile, horrible or inhuman in that it involved torture and depravity of mind."

The appellant's murder of Ms. Miller was a cold-blooded, execution-style killing, perpetrated for no other reason than to eliminate a witness to the murder of Captain Doe.

As noted in part one of the opinion, "the autopsy of Ms. Miller revealed that she had been shot four times: in the left forearm, the left shoulder, the right upper arm, and the mid-portion of the back of the skull, with the exit wound of the last listed shot being the right eye. The cause of death...was laceration and hemorrhage of the brain and cerebral trauma."

We note the following testimony of the appellant's accomplice, Timothy Helms, "I heard her [Ms. Miller] say, she said, 'Help me, I'm hurt, please help me,' and he [the appellant] put the gun in her back and shot her again and said, 'Shut up, woman."

This testimony clearly demonstrates that the fatal shot to the skull was not the first shot fired and that Ms. Miller suffered serious physical abuse prior to death.

Accordingly, we hold that the present jury was authorized to find, consistently with the United States Supreme Court's holding in Godfrey, and, beyond a reasonable doubt, that the appellant's murder of Ms. Miller was "outrageously or wantonly vile, horrible or inhuman in that it involved torture and depravity of mind." See Hance v. State, Case No. 36012, decided June 24, 1980, after the main opinion in this case.

Judgment affirming the death sentence is adhered to. All the Justices concur.

In the Supreme Court of Georgia

Decided: JUN 24 1980

35378. DAMPIER v. THE STATE.

ADDENDUM

Subsequent to our decision in this case, but prior to transmittal of the remittitur to the trial court, the Supreme Court of the United States has decided Godfrey v. Georgia, 48 LW 4541 (May 19, 1980). In that the appellant's sentence of death rests partially[1/] upon Ga. Code § 27-2534.1(b)(7), his sentence must be reviewed in light of Godfrey.

Code Ann. § 27-2534.1(b)(7) provides in pertinent part: "The offense of murder . . . was outrageously vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." In Godfrey, the court found that § (b)(7) was unconstitutionally applied in that case. We find material differences between Godfrey and the case under review, which distinguish this murder from the murder in Godfrey and from other "ordinary" murders for which the death penalty is not appropriate.

1/ The jury returned a finding of two statutory aggravating circumstances, Code Ann. §§ 27-2534.1(b)(2) and 27-2534.1(b)(7). In Godfrey, the court was concerned with a sentence of death resting exclusively on § 27-2534.1(b)(7). Godfrey v. Georgia, 48 LW 4541, n. 15. The other statutory aggravating circumstances are more "specific and measurable." Godfrey v. Georgia, 48 LW 4541,4542, n. 2. Therefore, under our decisions, the death penalty, infra, may be upheld upon § 27-2534.1(b)(2). Gates v. State, 244 Ga. 587 (261 SE2d 349) (1979); Burger v. State, 245 Ga. 458 (SE2d) (1980).

In our opinion in this case, we held that the jury's finding beyond a reasonable doubt that the "murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim," was supported by the evidence. The evidence in this case clearly establishes that the appellant planned to kill his victim in advance as part of an armed robbery, the sole purpose of which was to obtain funds to buy drugs. The victim was forced at gunpoint to drive his own vehicle to the chosen execution site. Once at the area, the victim dropped to his knees, wrapping his hands around his head; he begged for his life for a full five minutes; during this time, he was listening to the co-defendant encourage the appellant to kill him. The victim was also facing a large-bore shotgun pointed at his face.

While the death of a victim who dies instantaneously with little or no forewarning does not involve torture or aggravated battery, evidence of psychological abuse by the defendant to the victim prior to death, where it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm, may amount to serious physical abuse (i.e., torture of the victim), and will support a finding of depravity of mind of the defendant. Furthermore, while the death itself was relatively instantaneous, the victim was not a member of the

appellant's family, nor was the victim threatening or causing any emotional trauma to the appellant. The murder was a cold-blooded, execution-style killing, perpetrated for no other reason than to eliminate a witness to an armed robbery. The appellant did not acknowledge his responsibility for his crimes, but fled the state and had to be captured at gunpoint. Cf., Godfrey v. Georgia, supra.

Under the facts of this case, we find that the murder was a type universally condemned by civilized society as wantonly vile, horrible or inhuman, as it involved depravity of mind of the defendant and torture to the victim, as set forth above. See generally, Hance v. State, Ga. (Case No. 36012, decided June , 1980.)

Judgment of affirmance of the death penalty adhered to. All the Justices concur.

In the Supreme Court of Georgia

JUN 24 1980

35701. FAIR v. STATE

ADDENDUM

(a) Subsequent to our decision in this case, but prior to transmittal of the remittitur to the trial court, the Supreme Court of the United States has decided Godfrey v. Georgia, 48 LW 4541 (May 19, 1980). In that the appellant's sentence of death rests partially[1/] upon Ga. Code § 27-2534.1(b)(7), his sentence must be reviewed in light of Godfrey.

Code Ann. § 27-2534.1(b)(7) provides in pertinent part: "The offense of murder. . . was outrageously vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." In Godfrey, the court found that § (b) (7) was unconstitutionally applied in that case. We find material differences between Godfrey and the case under review, which distinguish this murder from the murder in Godfrey and from other "ordinary" murders for which the death penalty is not appropriate.

1/The judge found the existence of two statutory aggravating circumstances, Code Ann. §§ 27-2534.1(b)(2) and 27-2534.1(b)(7). In Godfrey, the court was concerned with a sentence of death resting exclusively on § 27-2534.1(b)(7). Godfrey v. Georgia, 48 LW 4541, n.15. The other statutory aggravating circumstances are more "specific and measurable." Godfrey v. Georgia, 48 LW 4541, 4542, n.2. Therefore, under our decisions, the death penalty, infra, may be upheld upon § 27-2534.1(b)(2). Gates v. State, 244 Ga. 587 (261 SE2d 349) (1979); Burger v. State, 245 Ga. 458 (SE2d) (1980).

In our opinion in this case, we held that the trial court's finding beyond a reasonable doubt that the murder was outrageously and wantonly vile, horrible and inhuman in that it involved depravity of mind on the part of the defendant, was supported by the evidence. That evidence showed that appellant had had no quarrel with his victim. Rather the victim was killed simply because he had witnessed appellant's previous murder and appellant was afraid he would testify against him. While pretending they were still friends, appellant lured the victim into a vulnerable position and then shot him in the head. Aside from laughing during the killing itself, appellant showed no remorse thereafter but instead bragged about the killing and said he would kill the other witnesses when he got out of jail. Appellant's accomplice cut the victim's throat and appellant then burned the body. A defendant who mutilates or seriously disfigures a victim's body after death (cf. Code Ann. § 26-1305), may be found to have a depraved mind and such acts would be sufficient to show depravity of mind of the defendant within the meaning of the statute. (See Hance v. State, Case No. 36012, Decided June 24, 1980, after the main opinion in this case.) Appellant's actions in this case take this murder out of the category of "ordinary murders."

(b) The trial judge also found the existence of statutory aggravating circumstance Code Ann. § 27-2534.1(b)(2) in that the Hall County murder was committed in the course of another capital offense, the Habersham County murder.

Subsequent to our decision in this case, but prior to transmittal of the remittitur to the trial court, the Supreme Court of the United States decided Standefer v. United States, 48 LW 4634 (June 9, 1980). The following language from that case is relevant to our discussion in the main opinion of the effect of appellant's subsequent acquittal of the first murder in Habersham County:

> "This case does no more than manifest the simple, if discomforting, reality that 'different juries [may] reach different results under any criminal statute. That is one of the consequences of our jury system.' Roth v. United States, 354 U. S. 476, 492 (1957). While symmetry of results may be intellectually satisfying, it is not required." 48 LW at 4638.

Judgments of affirmance of the death penalty adhered to. All the Justices concur except Hill, J. who concurs in the judgment and in part (a) of the Addendum.

80-5850

No. 80-

RECEIVED
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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

WILLIAM ANTHONY BROOKS,

Petitioner

against

STATE OF GEORGIA,

Respondent

MOTION FOR LEAVE TO PROCEED IN
THIS COURT IN FORMA PAUPERIS

Petitioner, by and through counsel, moves this Honorable Court, pursuant to Rule 46 of this Court, to permit him to proceed with this action in forma pauperis. As evidence of petitioner's poverty and in accordance with Rule 46, petitioner has submitted a notarized Affidavit of Poverty.

Petitioner prays that this Count grant this motion.

Respectfully submitted,

Stephen B. Bright
Counsel for petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

WILLIAM ANTHONY BROOKS,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, WILLIAM ANTHONY BROOKS being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. Yes_____ No ✓

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. _____

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes_____ No ✓

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes_____ No ✓

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes_____ No ✓

   a. If the answer is yes, describe the property and state its approxamate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None ✓

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

William A Brooks

WILLIAM ANTHONY BROOKS

STATE OF GEORGIA
COUNTY OF MUSCOGEE

SUBSCRIBED AND SWORN TO
before me this the 8 day of October, 1980.

Barbara Lamble

My Commission expires:

February 5, 1983